was made for damages to be assessed against H.S.C. the respondent could, had he wished to do so, have applied to be separately represented at the assessment because in the event of his losing on the issue of liability he might be bound by the assessment of damages. He made no such application. This is hardly surprising. As Chairman and Managing Director of H.S.C. he would presumably have had every opportunity to give such instructions as he thought fit to those appearing for that company when the assessment was made.

For these reasons their Lordships will allow the appeal, set aside the orders of the Court of Appeal and of the High Court and remit the case to the High Court with a direction that judgment for $570,500 be entered for the appellants. The respondent must pay the costs of the appeal to their Lordships' Board and the costs in both courts below.

Appeal allowed.

Solicitors: *Coward Chance; Linklaters & Paines.*

SINGAPORE REPORT

LIM CHIN YOK CO. LTD. v. MALAYAN INSURANCE CO. INC.

[C.A. (Wee Chong Jin C.J., Kulasekaram and Tan Ah Tah JJ.) November 28, 1974]

[Singapore — Civil Appeal No. 40 of 1973]

Damages — Negligence — Personal injuries — Paralysis of one side of body — Occupier's liability — Factories Act (Cap. 123), ss. 6, 7 & 31(1).

Insurance — Indemnity — Insurance policy — "Insured's immediate service" — Ambiguous — Construction — Condition repugnant to commercial purpose.

Master and Servant — Independent contractor — Transfer of control — Temporary master — Duty of care.

Tort — Occupier's liability — Independent contractor — Temporary master.

In the court below one M. Sukumaran sued the defendants (the appellants herein) for damages for personal injuries and consequential loss and expense occasioned by the negligence of the defendants in the maintenance of a piling frame. The defendants had contracted with the Ministry of the Interior and Defence to construct a sea wall. Their work was supervised by an engineer of the P.W.D. They hired the piling frame from another contractor and they sub-contracted with one Pareed Kunju for the supply of labour to operate it. Pareed Kunju was to be paid according to the extent of the piles driven into the ground. The piles were cast at the site by another sub-contractor and supplied to Pareed Kunju for him to cause them to be driven into the ground. The defendants took out a policy of insurance with the Malayan Insurance Co. Inc. the third party in these proceedings, to cover accidents at the site.

The plaintiff was one of the labourers supplied by Pareed Kunju. His duty was to work the engine situated at the base of the piling machine. On April 2, 1969, while he was doing his work, the pulley wheel at the top of the piling frame broke and part of it fall and struck the plaintiff who sustained very severe injuries *

The defendants denied liability and in turn claimed that they were entitled under the insurance policy to be indemnified by the third party (the respondents herein) to the full amount of all compensation and costs and expenses incurred in defending the action. The third party denied liability on the grounds that the plaintiff was not in the direct employ of the defendants at the material time, and that it was a condition of the contract of insurance that the defendants would take reasonable precautions to prevent accidents and that the defendants were in breach thereof.

The learned trial judge held that the plaintiff was entitled to succeed against the defendants and he accordingly entered judgment for the plaintiff on the agreed sum of $95,000, with costs. However, as to the defendants' claim against the third party, he held that the defendants were not entitled to succeed for two reasons: (a) that the plaintiff was not "an employee in the insured's immediate service"; (b) the defendants were in breach of condition 3 of the insurance policy in that they had not complied with their statutory obligations, to wit, the requirements of section 31 of the Factories Act.

The defendants appealed.

Held: (1) the word "immediate" in paragraph 2 of the policy of insurance in this case gave rise to an ambiguity. Therefore the policy must be construed *"contra proferentes"*;

(2) condition 3 of the policy in question was repugnant to the commercial purpose of the contract. In the circumstances of the case the defendants' appeal must be allowed.

* Particulars of Personal Injuries in the statement of claim were as follows: "5" linear laceration in the right frontoparietal region and compound depressed comminuted fracture of the skull especially on the right side. He had also a left hemiplegia. Laceration of the right cerebral hemispheres were also seen at operation. His left hemiplegia is permanent and he is unable to do any job."

Cases referred to:-

(1) *Wilsons & Clyde Coal Co. Ltd.* v. *English* [1938] A.C. 57.

(2) *Cavanagh* v. *Ulster Weaving Co. Ltd.* [1960] A.C. 145.

(3) *Gibb* v. *United Steel Companies Ltd.* [1957] 2 All E.R. 110.

(4) *Galashiels Gas Co. Ltd.* v. *O'Donnell (or Millar)* [1949] A.C. 275; [1949] 1 All E.R. 319.

(5) *Lim Thong Eng* v. *Sungei Choh Rubber Co. Ltd.* [1962] M.L.J. 15.

(6) *Lavender* v. *Diamints, Ltd.* [1949] 1 All E.R. 52.

(7) *Denham* v. *Midland Employers' Mutual Assurance Ltd.* [1955] 2 All E.R. 561 at p. 564.

(8) *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 K.B. 415 at p. 430.

(9) *Fraser* v. *B.N. Furman (Productions), Ltd.* [1967] 3 All E.R. 57.

COURT OF APPEAL.

H. E. Cashin and *C. R. Rajah* for the appellants.

James C. Chen for the respondents.

In the court below (Suit No. 20 of 1969) the following grounds of judgment were delivered on July 26, 1974:

Choor Singh J.: The plaintiff's claim in this action was for damages for personal injuries and consequent loss and expense occasioned by the negligence of the defendants in the maintenance of a piling frame.

The facts are these. In 1968 the defendants had a contract with the Ministry of the Interior and Defence to drive piles into the ground for the building of a retaining sea wall at Kallang. The defendants hired a piling frame from another contractor and they sub-contracted with one Pareed Kunju for the supply of labour to operate the piling frame. Pareed Kunju was to be paid according to the extent of the piles driven into the ground. The piles were cast at the site by another sub-contractor of the defendants and supplied to Pareed Kunju for him to drive them into the soil. The defendants took out a policy of insurance with the Malayan Insurance Co. Inc. the third party in these proceedings, to cover accidents at the site.

The plaintiff was one of the labourers supplied by Pareed Kunju to the defendants to work at the piling frame. It was his duty to work an engine situated at the base of the said piling machine which engine pulled a wire rope which ascended to the top of the said piling machine where it went round a pulley wheel fixed to the top of the said piling machine and then descended to the hammer which drove in the pile which was to be driven into the ground by the said piling machine. By means of the said engine, the plaintiff raised the hammer of the said piling machine a few feet and then released the power to allow the hammer to drop and thereafter again caused the said engine to pull on the wire rope to lift the hammer for a further drop and so on.

On the 2nd April 1969 while the plaintiff was performing his said duty the pulley wheel at the top of the piling frame, over which the said wire rope went, broke and part of the said wheel fell and struck the plaintiff who received very severe injuries.

It was the case for the plaintiff that the said accident was caused by the negligence of the defendants, their servants or agents and/or by breach by the defendants of their duty as employers of the plaintiff to take reasonable precautions for the safety of the plaintiff. Further, it was alleged that the said accident took place within a factory within the meaning of the Factories Ordinance, 1958, of which the defendants were the occupiers, or took place in a work place to which section 6(3) of the said Ordinance applied and that the said accident was caused by the defendants' breach of statutory duty. The defendants denied liability and in turn claimed that they were entitled under the said policy of insurance to be indemnified by the third party to the full amount of all compensation and costs and expenses incurred in the defence of this action. The third party denied liability on the ground that the plaintiff was not in the direct employ of the defendants at the material time. They also denied liability on the ground that it was a condition of the contract of insurance that the defendants would take reasonable precautions to prevent accidents and that the defendants were in breach thereof.

The facts of the case were not in dispute. According to their contract with the Ministry of the Interior and Defence the defendants had to construct a sea wall 460 feet in length involving reinforced concrete sheet piles. Their work was supervised by an engineer of the Public Works Department. The defendants were given possession of the site and they procured a piling frame from another contractor and got another contractor to fabricate the piles at the site. Then they got Pareed Kunju to supply labour to operate the piling frame and complete the piling work. All that Pareed Kunju contracted with the defendants was the "supply of labourers". The defendants' foreman supervised the piling work, gave orders to Pareed Kunju or his men as to how the work was to be done, instructed Pareed Kunju as to where the piling frame was to be placed and where the pile was to be driven. The only interest Pareed Kunju had in the piles was that he was to be paid by the foot length of the piles driven. The defendants supplied him the piling frame, the piles and oil for the engine of the piling frame. In short, all the equipment needed for the piling work was supplied by the defendants and they also paid for all the necessary repairs to the piling frame. Lim Wang Khee a director of the defendant company admitted in cross-examination that at the time of the accident, the piling frame was being operated and used by his company for their piling work at the site. He admitted further that his company had no direct dealings with the workers supplied by Pareed Kunju and that they were his employees.

In my judgment the plaintiff was entitled to succeed against the defendants under three heads of liability. First, as his employers, they were in breach of their common law duty to take reasonable care for his safety. It is the duty of an employer to take reasonable care for the safety of his workmen in the course of their employment, whether or not the employer takes any share in the conduct of the operation. See *Wilsons & Clyde Coal Co. Ltd.* v. *English*.[1] The last word on the subject is in *Cavanagh* v. *Ulster Weaving Co. Ltd.*,[2] where Lord Keith said: —

"The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen and all other rules or formulas must be taken subject to this principle."

And Lord Somerwell added: —

"The courts of first instance ... will proceed more satisfactorily if what I have called the normal formula — that is, reasonable care in all the circumstances, is applied whatever the circumstances."

In this case the defendants were clearly negligent and failed to take reasonable care in that they provided the plaintiff with a piling frame which had a defective pulley which broke and injured him.

Counsel for the defendants submitted that the defendants were not liable as employers because they were not the plaintiff's employers. It was contended that he was employed by Pareed Kunju who was an independent contractor.

It is true that Pareed Kunju was an independent contractor but his contract was merely for supplying labour for the piling operation which remained under the control and direction of the defendants. The defendants were in the position of being able to tell Kunju's labourers, what to do, where to do it and how to do it. There was transfer of control from Pareed Kunju to the defendants who were under the circumstances, while the piling operation was in progress, the temporary employers of the plaintiff. Once the right of control is transferred, the temporary master takes over all the ordinary liabilities of an employer and owes the employer's ordinary duty of care to the temporary servant. For example, in *Gibb* v. *United Steel Companies, Ltd.*,[3] where dock labourers had regulary worked for stevedores for many years, though the dock board were their nominal employers and paid their wages, it was held that the stevedores were in the position of temporary employers so as to be liable for an unsafe system of work.

In my opinion, on the facts of this case the plaintiff was clearly working for the defendants in operating their piling frame when he was injured and they were liable to him, as his employers, for their negligence in providing him with a piling frame which had an unsafe pulley which broke and injured him.

Counsel for the defendants submitted that the plaintiff contributed to the accident in that it was his duty to inspect the pulley every morning before operating the piling frame; that he had failed to do so and that had he done so on the day of the accident, the defect in the pulley would have been discovered. This allegation of negligence on the part of the plaintiff was rebutted by Pareed Kunju who stated that it was not the plaintiff's duty to inspect the pulley everyday and that all that the plaintiff had to do before work commenced was to see that there was sufficient oil in the engine which operated the piling frame and sufficient grease on the drum on which the piling frame steel rope was wound up. I accepted Pareed Kunju's evidence on this issue because in my opinion he was speaking the truth and rejected the claim that there was contributory negligence on the part of the plaintiff.

The defendants were also, in my opinion, liable for the injury caused to the plaintiff as occupiers of the premises on which he was injured. The defendants were in occupation of the site where the piling operation was going on when the plaintiff was injured. As occupiers they owed a duty to all persons lawfully on the premises to take reasonable care to avoid injuring them. The plaintiff was there lawfully, doing a job for the defendants. The defendants were using an unsafe piling frame and it was only after two weeks after the accident that they gave instructions that all workmen at the site must wear helmets.

Counsel for the defendants submitted that the defendants were not in occupation of the piling site; that it was Pareed Kunju who was in occupation and that it was again Pareed Kunju who was operating the piling frame as an independent contractor.

In my judgment, on the facts of this case, the defendants were in occupation of the site where the plaintiff was injured and they were therefore, as occupiers, liable to him for the injury sustained by him when he was lawfully at the site.

Lastly, the site at which the plaintiff was working at the time of the accident was a factory by virtue of the provisions of section 6(2)(q) of the Factories Act (Cap. 123). As the defendants were in occupation of the site and had control of the piling frame, they were therefore occupiers of the said "factory" within the meaning of "occupier" laid down in section 7 of the Act. The piling frame was a "lifting appliance" as defined in section 7 of the Act and it was therefore governed by section 31(1) of the Act which provides as follows: —

"31.—(1) No lifting appliance or lifting machine shall be used unless —

(a) it and every part of it including all working gear and all plant or gear used for anchoring or fixing the appliance or machine is of good construction, sound material, adequate strength and substance, and free from patent defect;

(b) it is properly maintained; and

(c) it has been tested and thoroughly examined by or on behalf of the manufacturer or by an approved person and a certificate of such test and examination specifying the safe working load and signed by or on behalf of the manufacturer or by the approved person has been obtained and is kept available for inspection."

The expression "maintained" is defined in section 7 of the Act to mean "maintained in an efficient state, in efficient working order and in good repair". As the Act uses the expression "properly maintained", it might be thought that this refers to maintenance in the accepted engineering sense *i.e.* inspection and overhaul according to a recognised schedule. This construction however was rejected by the House of Lords in *Galashiels Gas Co. Ltd.* v. *O'Donnell (or Millar*[4]). Section 176(1) of the English Factories Act, 1961 defines "maintained" to mean "maintained in an efficient state, in efficient working order, and in good repair" and the House of Lords decided that as soon as a thing breaks down, it ceases to be "maintained in efficient working order", and *ipso facto* the statutory duty is broken.

A statutory duty is absolute in the sense that whatever the statute prescribes must be strictly performed. If the Act, according to its true construction, has not been complied with, liability is automatic. In this case the defendants had failed to perform their duty and this breach of duty had resulted in harm to the plaintiff. He was therefore entitled to succeed in his claim for damages against the defendants.

Counsel for the defendants submitted that the defendants were not liable under the Factories Act because the plaintiff was not an employee of the defendants and that to recover under section 31 of the Factories Act, the plaintiff must be an employee of the occupiers of the factory. I was unable to accept this submission. The plaintiff was a workman operating the defendants' piling frame for the use of the defendants and he was clearly one of those persons for whose protection the safety rules in section 31 were made. There are no words of limitation in the said section and in my judgment any person injured while operating a "lifting appliance" in a factory, whether employed by its occupier or not, is entitled to invoke section 31 in his claim for damages against the occupier of the factory. The two cases cited by counsel, *Lim Thong Eng* v. *Sungei Choh Rubber Co. Ltd.*,[5] and *Lavender* v. *Diamints, Ltd.*,[6] are of no assistance to the defendants. In fact both are against the defendants in so far as breach of statutory duty is concerned. Furthermore, as already stated, the defendants were, in the circumstances of this case, the temporary employers of the plaintiff when he was injured in their factory and they were therefore, in any event, liable to him for breach of their statutory duty.

Damages having been agreed by all the parties in the sum of $95,000 judgment was entered in favour of the plaintiff against the defendants for the said sum of $95,000 and costs as taxed.

As regards the defendants' claim against the third party under the policy of insurance to be indemnified to the full amount of compensation and costs, it is necessary to look at the terms of the policy of insurance. Paragraph 2 of the policy reads as follows: —

"NOW THIS POLICY WITNESSETH that if at any time during the Period of Insurance any employee in the Insured's immediate service shall sustain personal injury by accident or disease arising out of and in the course of his employment by the Insured in the Business and if the Insured shall be liable to pay compensation for such injury either under the law(s) set out in the Schedule or at Common Law then subject to the terms, exceptions and conditions contained herein or endorsed hereon the Company will indemnify the Insured against all sums for which the Insured shall be so liable and will in addition be responsible for all costs and expenses incurred with its consent in defending any claim for such compensation."

Condition 3 of the policy reads as follows: —

"The Insured shall take reasonable precautions to prevent accidents and disease and shall comply with all statutory obligations."

Condition 9 of the policy reads as follows: —

"The due observance and fulfilment of the terms, conditions and endorsements of this Policy so far as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the Proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy."

In my judgment the defendants were not entitled to succeed against the third party as the plaintiff was not "an employee in the insured's immediate service". Secondly the defendants were in breach of condition 3 of the policy in that they had not complied with their statutory obligations, to wit, the requirements of section 31 of the Factories Act. Under the circumstances the defendants' claim against the third party failed and it was dismissed with costs.

The defendants appealed against the decision of the learned trial judge as regards their claim against the third party. The judgment of the Court of Appeal was delivered by:

Tan Ah Tah J.: In this case the plaintiff sued the defendants for damages for personal injuries and consequential loss and expense occasioned by the negligence of the defendants in the maintenance of a piling frame.

In 1968 the defendants had a contract with the Ministry of the Interior and Defence to drive piles into the ground for the building of a retaining sea wall at Kallang. The defendants hired a piling frame from another contractor and they sub-contracted with one Pareed Kunju for the supply of labour to operate the piling frame. Pareed Kunju was to be paid according to the extent of the piles driven into the ground. The piles were cast at the site by another sub-contractor of the defendants and supplied to Pareed Kunju for him to cause them to be driven into the ground. The defendants took out a policy of insurance with the Malayan Insurance Co. Inc. the third party in these proceedings, to cover accidents at the site.

The plaintiff was one of the labourers supplied by Pareed Kunju to the defendants to work at the work site. It was his duty to work an engine situated at the base of the piling machine which engine pulled a wire rope which ascended to the top of the said piling machine where it went round a pulley wheel fixed to the top of the piling machine and then descended to the hammer which drove in the pile which was to be driven into the ground by the piling machine. By means of the engine, the plaintiff raised the hammer of the piling machine a few feet and then released the power to allow the hammer to drop and thereafter again caused the engine to pull on the wire rope to lift the hammer for a further drop and so on.

On the 2nd April 1969, while the plaintiff was doing the work which has been described, the pulley wheel at the top of the piling frame, over which the said wire rope went, broke and part of the wheel fell and struck the plaintiff who sustained very severe injuries.

The defendants denied liability and in turn claimed that they were entitled under the said policy of insurance to be indemnified by the third party to the full amount of all compensation and costs and expenses incurred in the defence of this action. The third party denied liability on the ground, as alleged in their defence, that the plaintiff was not in the direct employ of the defendants at the material time. The third party also denied liability on the ground that it was a condition of the contract of insurance that the defendants would take reasonable precautions to prevent accidents and that the defendants were in breach thereof.

The facts of the case were not in dispute. According to their contract with the Ministry of the Interior and Defence the defendants had to construct a sea wall 460 feet in length involving reinforced concrete sheet piles. Their work was supervised by an engineer of the Public Works Department. The defendants were given possession of the site and they procured a piling frame from another contractor and made arrangements

with another contractor to fabricate the piles at the site. Then they arranged with Pareed Kunju for the supply of labour by him to operate the piling machine and complete the piling work. All that Pareed Kunju contracted with the defendants was the "supply of labour." The defendants' foreman supervised the piling work, gave orders to Pareed Kunju and his men as to how the work was to be done, instructed Pareed Kunju as to where the piling frame was to be placed and where the piles were to be driven. The only interest Pareed Kunju had in the piles was that he was to be paid by the foot length of the piles driven. The defendants supplied him the piling frame, the piles and oil for the engine of the piling frame.

The learned trial judge held that the plaintiff was entitled to succeed against the defendants. He accordingly entered judgment for the plaintiff against the defendants for the sum of $95,000, which had been agreed by all the parties, with costs.

With regard to the defendants' claim against the third party under the policy of insurance the learned trial judge referred to paragraph 2 and conditions 3 and 9 of the policy.

Paragraph 2 of the policy reads as follows: —

"NOW THIS POLICY WITNESSETH that if at any time during the Period of Insurance any employee in the Insured's immediate service shall sustain personal injury by accident or disease arising out of and in the course of his employment by the Insured in the Business and if the Insured shall be liable to pay compensation for such injury either under the law(s) set out in the Schedule or at Common Law then subject to the terms, exceptions and conditions contained herein or endorsed hereon the Company will indemnify the Insured against all sums for which the Insured shall be so liable and will in addition be responsible for all costs and expenses incurred with its consent in defending any claim for such compensation."

Condition 3 of the policy reads as follows: —

"The Insured shall take reasonable precautions to prevent accidents and disease and shall comply with all statutory obligations."

Condition 9 of the policy reads as follows: —

"The due observance and fulfilment of the terms, conditions and endorsements of this Policy so far as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the Proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy."

The learned trial judge held that the defendants were not entitled to succeed against the third party for two reasons. The first reason was that the plaintiff was not "an employee in the Insured's immediate service." The second reason was that the defendants were in breach of condition 3 of the policy in that they had not complied with their statutory obligations, to wit, the requirements of section 31 of the Factories Act. For these reasons, the defendants' claim against the third party was dismissed with costs. It is against this decision that this appeal has been brought by the defendants.

It should be observed that in dealing with the claim of the plaintiff against the defendants the learned trial judge found that the defendants were the temporary employers of the plaintiff and he referred to the plaintiff as a temporary servant. He found as a fact that the defendants were in the position of being able to tell the labourers supplied by Pareed Kunju, including the plaintiff, what to do, where to do it and how to do it.

In the case of *Denham* v. *Midland Employers' Mutual Assurance, Ltd.*,[7] in dealing with a labourer who was described as a temporary servant, Denning L.J. (as he then was) said: —

"There is no harm in thus describing him, so long as it is remembered that it is a device designed to cast liability on the temporary employer. The real basis of the liability, however, is, simply this: If a temporary employer has the right to control the manner in which a labourer does his work, so as to be able to tell him the right way or the wrong way to do it, then he should be responsible when he does it in the wrong way as well as in the right way. The right of control carries with it the burden of responsibility."

It is true that Denning L.J. goes on to say that he cannot regard the propositions about "temporary servant" and "temporary employer" as decisive of the questions before the Court of Appeal in that case. But the idea that there can be two types of employees in this context gives rise to confusion. In our opinion the word "immediate" in paragraph 2 of the policy gives rise to an ambiguity. The policy must therefore be construed *"contra proferentes."* If any authority is required for this proposition it can be found in *Re Bradley and Essex and Suffolk Accident Indemnity Society*[8] where Farwell L.J. said: —

"Accordingly, it has been established that the doctrine that policies are to be construed *'contra proferentes'* applies strongly against the company."

It is therefore necessary to construe the words "any employee in the insured's immediate service". These words may have more than one meaning. They may mean (i) any employee in the insured's immediate service as contrasted with temporary service; (ii) any servant of the insured; (iii) any servant but not a temporary servant of the insured; (iv) any person employed by the insured or (v) any servant, permanent or temporary of the insured. It is to be remembered that in the context of employment in Singapore there have always been persons who are employed on a daily basis. Their employment is on a day to day basis and in that sense any one so employed can be said to be a temporary servant or employee. Nevertheless as a temporary servant or employee of his employer he is in one sense when so employed "in the *immediate service*" of his then employer albeit his service or employment is only for one day.

Accordingly, we are of the opinion that the learned trial judge should have applied the *"contra proferentes"* doctrine and should have held that the plaintiff was "an employee in the insured's immediate service" and that the defendants were covered by the policy in question.

In dealing with the second reason, it is relevant to refer to *Fraser* v. *B.N. Furman (Productions), Ltd*[9] where the condition was in these terms: "The insured shall take reasonable precautions to prevent accidents and disease." In that case Diplock L.J. (as he then was) said, at page 60: —

"There are three considerations to be borne in mind on the wording of this condition. (i) It is the insured personally who must take reasonable precautions. Failure by an em-

ployee to do so, although the employer might be liable vicariously for the employee's negligence or breach of statutory duty, would not be a breach of the condition. That was established in, and was the ratio decidendi of, *Woolfall & Rimmer, Ltd.* v. *Moyle and Another.* (ii) The obligation of the employer is to take precautions to prevent accidents. This means in my view to take measures to avert dangers which are likely to cause bodily injury to employees. (iii) The third word to be construed in this context is 'reasonable'. 'The insured shall take reasonable precautions to prevent accidents.' 'Reasonable' does not mean reasonable as between the employer and the employee. It means reasonable as between the insured and the insurer having regard to the commercial purpose of the contract, which is *inter alia* to indemnify the insured against liability for his (the insured's) personal negligence. That, too, is established by the case that I have cited. Obviously the condition cannot mean that the insured must take measures to avert dangers which he does not himself foresee, although the hypothetical reasonably careful employer would have foreseen them. That would be repugnant to the commercial purpose of the contract, for failure to foresee dangers is one of the commonest grounds of liability in negligence. What in my view is 'reasonable' as between the insured and the insurer, without being repugnant to the commercial object of the contract, is that the insured should not deliberately court a danger, the existence of which he recognised, by refraining from taking any measures to avert it. Equally the condition cannot mean that, where the insured recognises that there is a danger, the measures which he takes to avert it must be such as the hypothetical reasonable employer, exercising due care and observing all the relevant provisions of the Factories Act, 1961, would have taken. That, too, would be repugnant to the commercial purpose of the contract, for failure to take such measures is another ground of liability in negligence for breach of statutory duty.

What in my judgment is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger, should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligent; it must be at least reckless, i.e., made with actual recognition by the insured himself that a danger exists, not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not refrain from taking precautions which he knows ought to be taken because he is covered against loss by the policy."

In the circumstances of the present case, condition 3 is in our opinion repugnant to the commercial purpose of the contract. The second reason is therefore also not a valid reason for dismissing the defendants claim against the third party.

In our judgment, the defendants' appeal should be allowed with costs here and in the court below.

Appeal allowed.

Solicitors: *Tan Rajah & Cheah; Laycock & Ong.*

MALAYSIAN REPORTS

ENG GIAP PUBLIC MOTOR BUS CO. LTD. v. GAN ENG KENG & 36 ORS.

[F.C. (Gill C.J., Ong Hock Sim and Raja Azlan Shah F.JJ.) August 30, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 119 of 1973]

Master and Servant — Bus drivers and conductors — Claim for overtime — Long hours of inactive employment — Employment Ordinance, 1955, ss. 60A and 70.

The respondents had been employed by the appellants as bus drivers and conductors. They had to work approximately twelve hours a day and their wages were originally inclusive of overtime work. The respondents claimed overtime wages for the average of 60 hours a month, to which they claimed they were entitled after the coming into force of section 60A(3) of the Employment Ordinance, 1955 on the October 9, 1969. The appellants had continued to pay the same wages to the respondents after the coming into force of that law. The Labour Officer who conducted the inquiry under section 70 of the Employment Ordinance, made an order that the appellants pay overtime wages for 4 hours a day. On appeal to the High Court, the High Court dismissed the appeal and confirmed the order of the Labour Officer but ordered that the amount of overtime for the first eight days of October 1969 be deducted, as the new law did not come into effect till October 9, 1969. The appellants appealed to the Federal Court.

Held: (1) as there was no dispute as to the number of hours for which the respondents worked and as there was no written contract of service, whatever overtime work the respondents did was clearly done at the request of the appellants and they were therefore entitled to overtime wages;

(2) in this case the learned judge should have considered the provisions of section 60A(8) of the Employment Ordinance, 1955. In the light of that provision, as each of the respondents had at least two hours of inactive or standby employment in relation to the 4 hours of overtime work, such rest periods must be treated as long hours of inactive employment;

(3) the respondents were therefore entitled to wages for two hours of overtime work per day.

Case referred to:-

(1) *Bonham-Carter* v. *Hyde Park Hotel* 64 T.L.R. 177, 178.

FEDERAL COURT.

Edgar Joseph Jr. (*V. C. George* with him) for the appellants.

D. Puthucheary for the respondents.

Gill C.J.: This is a further appeal to this court from the dismissal by the High Court of an appeal by the appellants against an order of a Labour Officer requiring them to pay to the Commissioner for Labour, Negri Sembilan a sum of $7,407.60 being wages for overtime work performed by the respondents as employees of the appellants.

The claim for the recovery of overtime wages was made in pursuance of section 60A(3) of the Employment Ordinance, 1955 which came into force on 9th October 1969. The proceedings commenced with the first respondent, Gan Eng Keng, presenting a written statement of complaint to the Labour Office, Seremban under section 70(a) of the said Ordinance. Encik Koh Ah Lek, a Labour Officer, examined the complainant on affirmation and recorded the substance of the complainant's statement as required by section 70(b) of the Ordinance. Having stated on affirmation that he had been appointed as the spokesman for the other com-